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Supreme Court of the United States

October Term, 1958

No. 771

[illegible] Appellants,

against

[illegible] Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ROBERT F. WAGNER, ET AL. AND THE CITY OF NEW YORK, RESPONDENTS, IN OPPOSITION

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Supreme Court of the United States

October Term, 1958

No. 771

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY, d/b/a Loric Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO., INC., SCHUCKMAN PRESS, INC., 145-147 W. 61ST CORPORATION, individually and on behalf of all others similarly situated,

against *Petitioners,*

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency; WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency; CITY OF NEW YORK; ROBERT F. WAGNER, individually and as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York; FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ROBERT F. WAGNER, ET AL. AND THE CITY OF NEW YORK, RESPONDENTS, IN OPPOSITION

Respondents Robert F. Wagner, *et al.*, constituting the Board of Estimate of the City of New York, and the City of New York, for their statement in opposition to petitioners' application for a writ of certiorari, respectfully show the following:

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (reported in 263 F. 2d 244) is set forth in Appendix B to the petition, pp. 26-36.

The opinion of the District Court is reported in 166 F. Supp. 129.

Questions Presented

1. Are any substantial federal questions presented by the following:

(a) Petitioners' contention that the First Amendment bars a grant of Federal funds to the City of New York for use in the Lincoln Square Slum Clearance and Redevelopment Project in view of (1) the final judgment of the New York State Court of Appeals that the First Amendment does not bar the use of City funds for that project (*64th Street Residences Inc.* v. *City of New York*, 4 N Y 2d 268 [1958], (2) the denial by this Court of an application for a writ of certiorari to review that determination (*Harris* v. *City of New York*, 357 U. S. 907 [1958]), (3) the well-established judicial decisions supporting such determinations and (4) Petitioners' concession (Petition, p. 3) of the correctness of the judgment below in dismissing the complaint as to all respondents other than the Federal officials; and

(b) Petitioners' contention that they had the right to a hearing before the Federal Housing and Home Finance Agency?

2. Do petitioners have standing to prevent the expenditure of Federal funds in connection with the Lincoln Square project?

As a result of petitioners' concession of the validity of the City's action in acquiring and reselling the Lincoln Square area for redevelopment by various sponsors including Fordham University, this action seeks merely to enjoin the use of Federal funds for a concededly valid purpose.

Statement

(A) The Lincoln Square Project

The Lincoln Square Urban Renewal Project was adopted by the Board of Estimate of the City of New York on November 26, 1957, pursuant to the provisions of General Municipal Law, §72-K,* enacted in 1945. That statute authorizes municipalities to acquire real property by condemnation or otherwise "necessary for or incidental to the clearance, replanning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas, together with adequate provision for recreational and other facilities appurtenant thereto."

The statutory procedure followed by the City and upheld by the New York Court of Appeals (*Kaskel* v. *Impellitteri*, 306 N. Y. 73 [1953], cert. den. 347 U. S. 934 [1954]), has been to acquire the real property in a substandard and insanitary area and to resell it at public auction to the highest bidders, who are obligated by the terms of their deeds, to relocate the tenants from the sites, demolish existing structures and redevelop the land upon terms and conditions prescribed by the Board of Estimate and the Federal Urban Renewal Administration. This was the same procedure that had been adopted by the City of New York in each of the eleven prior urban renewal projects (50a-53a**).

The Lincoln Square Project Plan provides for the clearance and redevelopment of a 13-block substandard area on the West Side of Manhattan for the following uses: Collegiate, multi-family residential, commercial, retail, Public and Semi-Public.

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* This statute is set forth in the Appendix hereto.

** Page references followed by the letter "a" refer to the Appendix to Appellants' Brief in the court below.

There is nothing in the Plan which requires the developer of the collegiate area to be a sectarian institution. By its terms, the Plan permits effectuation by either a non-sectarian or sectarian institution (Urban Renewal Plan annexed to defendants' answer in the *64th Street Residences* case).

(B) The Sponsorship Contract

As part of the preliminary procedures established for slum clearance projects, the Slum Clearance Committee, in a widely advertised program, invited preliminary bids from persons or institutions willing to undertake redevelopment of a site in the proposed Lincoln Square area (R. 14, 15, 153, 166*). Such sponsors included persons or corporations interested in redeveloping for housing, cultural, commercial, collegiate and institutional purposes. The Board of Estimate approved four of five proposed sponsors, including Fordham University, which executed a sponsorship contract approved by the Board of Estimate, whereby it bound itself to make a minimum bid for a portion of the area to be devoted to educational purposes. The price of $7 a square foot, which Fordham agreed to bid, is in excess of the appraised value for collegiate re-use and is equal to the price to be bid by the housing sponsor in the project for the best commercial use for which the Lincoln Square site could be developed (R. 159).

The purpose of the sponsorship contract was merely to assure the City that at least one bidder would make a minimum bid at the public sale and that there would be at least one educational institution interested in clearing and redeveloping the collegiate site (R. 62). This is appar-

* Page references preceded by the letter "R" refer to the Record on Appeal in *64th St. Residences, Inc.* v. *City of New York*, 4 N Y 2d, 268 (1958), cert. den. *sub nom. Harris* v. *City of New York*, 357 U. S. 907 (1958), one of the exhibits in the present action (104a).

ent from its terms, under which *Fordham could not be the redeveloper unless is was the highest bidder at the public auction* (R. 63; Fordham Sponsorship Contract annexed as Exhibit B to defendants' answer in the *64th Street* case, pages 3, 4, 6 and 7). The terms of the Sponsorship Contract also demonstrated that the Project Plan comprehended redevelopment of the collegiate section by *any* educational institution *which might be the highest bidder at public auction* and that it was not limited solely to Fordham as a redeveloper (Fordham Sponsorship Contract, *id.*, pages 3, 4, 6, 7, 12).

Thus, all that the Fordham sponsorship contract did was recognize that Fordham had the same right to bid at public auction as was available to all other institutions, sectarian or non-sectarian, and bound Fordham to make a minimum bid—a term inserted for the protection of the City.

(C) The Capital Grant Contract

On November 26, 1957, the Board of Estimate also approved and authorized the execution of a capital grant contract with the Federal Housing and Home Finance Agency, which approved the project plan and the capital grant contract on December 26, 1957 (20a). In this contract, executed pursuant to Title I, National Housing Act of 1949, 63 Stat. 413, as amended, 42 U. S. C. 1441 *et seq.*, the Federal Agency agreed to reimburse the City of New York to the extent of two-thirds of the difference between the cost of the area acquired by condemnation and the amounts received at the public auction sale.

(D) Prior Court Actions

This is the fifth action brought without success by the opponents of the Lincoln Square Project to have that project declared illegal. In addition to the *64th Street Residences* (*supra*, p. 2), there were *Lochner* v. *City of New York*, 162 N. Y. S. 2d 233 (Sup. Ct., N. Y. Co., 1957), *89 Amsterdam Avenue Corp.* v. *The City of New York*, N. Y. L. J., November 13, 1957, page 7 (Sup. Ct., N. Y. Co.), and *Cohen* v. *City of New York*, N. Y. L. J., August 7, 1958, p. 7 (U. S. D. C., S. D. N. Y.)

While the *64th St. Residences* appeal was pending in the New York Court of Appeals, the City of New York moved for an order of condemnation in the Supreme Court, County of New York. The motion was granted on February 28, 1958 and the order of condemnation, entered on that day, vested title in the City of New York to the project area. On the afternoon of that day, the public auction was held, as previously advertised, and portions of the area were sold to the sponsors at the minimum prices stated in the sponsorshsip contracts (Complaint, Pars. 24, 25; p. 20a).

The trial of the condemnation proceeding commenced on September 29, 1958 and is unfinished as of the present time. Partial condemnation decrees have been entered, in one of which petitioner Schuckman Press, Inc. was awarded $4,250 for its trade fixtures. That amount, plus interest, was paid to it by the City of New York on February 5, 1959.

(E) 64th Street Residences Action

An action entitled, *64th Street Residences Inc.* v. *City of New York*, was commenced on December 2, 1957, in the Supreme Court of the State of New York by certain property owners and residential and business tenants in the Lincoln Square area, suing for themselves and all others similarly situated. Petitioners here are represented by the same attorneys who brought that action. Except for appellees Cole and Fried, the defendants were the same in both actions.

As in the present case, the complaint asked for a judgment invalidating the Lincoln Square project upon the ground that the participation of Fordham University, a denominational school, as a sponsor, and the proposed sale of the collegiate site to Fordham at a price considerably less than the expected cost of the site to the City of New York violated the "establishment of religion" clause of the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment (R. 14-17).

The New York Court of Appeals unanimously affirmed a judgment of the Supreme Court, New York County, dismissing the complaint (*64th St. Residences, Inc.* v. *City of New York, supra*, 4 N Y 2d 268). After reciting the facts, Judge DESMOND described the action as one based upon the contention "that the resale of part of this area [the Lincoln Square project site] to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of $3,500,000 in violation of Section 7 of Article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions" (4 N Y 2d, at p. 275).

"The argument however," the Court stated, "proceeds on an assumption false in fact" (*ibid.*). The false assumption is that Fordham acquired at public auction the same property that the city acquired in condemnation. As the Court of Appeals pointed out, "what the City is buying is not the same as what Fordham is buying. The City buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. • • • Therefore, there is no substance to the assertion on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property" (p. 276).

An application for a writ of certiorari brought by those plaintiffs in the *64th St. Residences* action who were residential and business tenants was denied by this Court on June 9, 1958. (*Harris v. City of New York, supra,* 357 U. S. 907.)

(F) The Gart Action

On June 17, 1958 the petitioners instituted the *Gart* action in the District Court for the Southern District of New York. As in the *64th St. Residences* action, the plaintiffs were property owners and residential and business tenants in the area, suing for themselves and all others similarly situated (9a, 33a).

The defendants were the same as in the *64th St. Residences* action with the addition of Albert M. Cole, Administrator, and Walter S. Fried, New York Regional Administrator, of the Federal Housing and Home Finance Agency. As to the City of New York and the redevelopers, the complaint contained the same allegations of unconstitutionality as in the prior action and asked for the same judgment declaring the Lincoln Square Project illegal (104a, 114a-116a).

As to the federal officials, the complaint asked for judgment declaring the Administrator's approval of the project illegal and enjoining him from expending any federal moneys pursuant to the capital grant contract. The grounds of alleged illegality were that in denying plaintiffs Schuckman and Howdibon and others the opportunity to be heard with respect to the approval of the Lincoln Square Project, the Administrator violated the provisions of the Housing Act of 1949, 42 U.S.C. §§1441 et seq., §5 of the Administrative Procedure Act of 1946, 5 U.S.C. §1004, and the due process clause of the Fifth Amendment (Par. 30, pp. 22a-23a); that in denying them a hearing he illegally delegated to the New York City Planning Commission his authority to determine whether or

not the City had submitted a "workable program" of slum elimination, as required by §101 (c) of Title I of the Housing Act, 42 U.S.C. §1451 (c) (Par. 31, 23 a); that his approval of the Lincoln Square project, which included Fordham University as the sponsor of the Collegiate area, was in violation of the establishment of religion clause of the First Amendment (Par. 32, p. 24a).

The District Court (DIMOCK, J.) granted the defendants' motion for summary judgment in an opinion reported in 166 F. Supp. 129. The Court held that the judgment in the *64th St. Residences* action was *res judicata* as to the constitutionality of the Lincoln Square project (166 F. Supp., at pp. 131-133). The Court of Appeals affirmed the judgment of dismissal. Writing for a unanimous Court, Chief Judge CLARK held (Appendix "B" to Petition, p. 28 *et seq.*):

1. "As members of the classes of plaintiffs represented in the *64th Street Residences* case, appellants are barred by the judgment there from relitigating these issues with these defendants in the New York courts. *Ashton* v. *City of Rochester*, 133 N. Y. 187, 195, 30 N. E. 965, 31 N. E. 834, 28 Am. St. Rep. 619; *People's Gas & Elec. Co. of Oswego* v. *City of Oswego*, 207 App. Div. 134, 202 N. Y. S. 243, affirmed 238 N. Y. 606, 144 N. E. 911; *Campbell* v. *Nassau County*, 192 Misc. 821, 82 N. Y. S. 2d 179, affirmed 274 App. Div. 929, 83 N. Y. S. 2d 511. And the full-faith-and-credit clause requires a federal court to give equal effect to that judgment as a bar to relitigation of these issues. *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 86 A. L. R. 298; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 150 A. L. R. 413. See also *McIntosh* v. *City of Pittsburgh*, C. C. W. D. Pa., 112 Fed. 705." (*Id.*, p. 29)

2. "The first claim [against Appellees Cole and Fried] but repeats the one so strongly asserted against

the City and the project sponsors in the state case. The first amendment's requirement of the separation of church and state applies equally to the state and federal government * * * (citing cases)." (p. 32)

3. "As to both governments, the basic issue concerns the transaction between the City and Fordham University. Moreover, the City's use of federal funds was considered by the New York Court of Appeals in its opinion in *64th Street Residences* and was heavily stressed by the plaintiffs there in the petition for certiorari. And as a practical matter, the relief appellants seek in this action against the FHHFA will curtail the progress of the Lincoln Square Urban Renewal Project as effectively as the direct injunctive relief against the active Project participants unsuccessfully sought in the New York courts. These appellees have once successfully litigated this issue to a final judgment. In these circumstances there can be no doubt but that the New York courts would not permit this relitigation of the same issue. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97; *Good Health Dairy Products Corp. of Rochester, N. Y.* v. *Emery*, 275 N. Y. 14, 9 N. E. 2d 758, 112 A. L. R. 401. See also *Kessler* v. *Eldred*, 206 U. S. 285. *Hence it is barred here.*" (Emphasis added.) (p. 32)

4. "Plaintiffs do have standing in this action to challenge the Administrator's refusal to grant them an oral hearing on the feasibility of the City's relocation plan. *But there is no basis, statutory or otherwise, for the right to appear and be heard before the Administrator which appellants claim.*" (Emphasis added.) (p. 34)

Judge CLARK held that the Housing Act does not require the Administrator to hold an oral hearing on the project plan. He noted that the Act does require public

hearings before the municipal authorities. (Such public hearings were in fact held. Complaint, Par. 18, Par. 30, 18a.) "Here," he concluded, "the FHHFA afforded appellants opportunity to submit documentary information on the plan's feasibility. More than this the Housing Act does not require." (Appendix "B", p. 35).

The Court noted that the Housing Act contains no express requirement of an open adjudicative hearing and that §5 of the Administrative Procedure Act, 5 U. S. C. §1004 applies only to "a case of adjudication required by statute to be determined upon the record after opportunity for agency hearing" (Appendix "B", p. 35).

With respect to procedural due process the Court said (Appendix "B", p. 36):

> "The Administrator's review of the proposal for relocation here lacks the direct impact of the deportation of an alien in *Wong Yang Sung* v. *McGrath*, supra, 339 U. S. 33, or the denial of a certificate of public convenience to a public carrier in *Riss & Co.* v. *United States*, 341 U. S. 907, or the denial of an individual citizen's right to use the mails in *Cates* v. *Haderlein*, 342 U. S. 804, and *Door* v. *Donaldson*, D. C. Cir., 195 F. 2d 764—cases on which appellants rely."

POINT I

No substantial question with respect to the First Amendment is presented.

A. The participation of Fordham University in the Lincoln Square project does not violate the First Amendment.

The first question presented by the petition is the same as that stated in the petition for certiorari which this Court denied in *Harris* v. *City of New York, supra,* 357 U. S. 907. There this Court declined to review the determination of the New York courts that the designation by the City of New York of Fordham as a sponsor of the collegiate site and the sale to Fordham of that site did not violate the First Amendment. *64th St. Residences, Inc.* v. *City of New York, supra,* 4 N Y 2d 268.

That determination is in accord with this Court's statement in *Berman* v. *Parker,* 348 U. S. 26, 34-35 (1954). It is also in accord with the history and practice of neighborhood planning and redevelopment (R. 50-59) and with the holdings of this and other courts that denominational institutions must be afforded equal right to participate in the benefits of zoning legislation. *Village of University Heights* v. *Cleveland Jewish Orphan Home,* 20 F. 2d 743 (6th Cir., 1927); cert. den. 275 U. S. 569 (1927); *Matter of Diocese of Rochester* v. *Planning Board,* 1 N Y 2d 508, 522 (1956); *Matter of Community Synagogue* v. *Bates,* 1 N Y 2d 445, 458 (1956). It is also based upon the principles that religious institutions may deal at arm's length with a governmental agency; that where there is an exchange of considerations, there is no gift or subsidy; and finally, that a denial of this right to deal with governmental agencies on this basis would be a denial of the rights of the religious institution under the First Amendment. A fundamental aspect of the protection provided by

the First Amendment is found in those cases in which this Court has held that public welfare legislation, such as the slum clearance statute here involved and the acts taken thereunder, which extends the general benefits of State law "to all its citizens without regard to their religious belief", is not to be considered as an establishment of religion. *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947); cf. *Zorach* v. *Clauson*, 343 U. S. 306, 312-313 (1952).

While professing acceptance of these principles, the petitioners nevertheless claim to find their violation in the circumstances of this case, because Fordham acquired the educational site at a price less than its estimated cost to the City. Their contention, however, is based, as the New York Court of Appeals found, upon "an assumption false in fact" (*infra*, p. 7). The petitioners have sought to equate two dissimilar items. What the religious institution acquires at public auction is not the same thing that the municipality acquires upon condemnation of the private site. The municipality pays the private owners the full market value of the buildings and land unrestricted as to use, as of the date of acquisition. What the religious institution or any other redeveloper buys at public auction is land which, under the terms of the sale, it must clear and redevelop for the purpose required by the plan. To do this, it must relocate present occupants, raze the buildings and erect new structures to conform to the site plan, all within time limits fixed by the plan. The land it acquires is also burdened by a restriction limiting its use to educational purposes. Obviously, therefore, the acquisition cost to the City for elimination of a slum is wholly unrelated to the value of the real property as resold to the redeveloper. Moreover, as the New York Court of Appeals noted, the price paid by Fordham exceeds the reuse value of the land as restricted to educational purposes. Consequently, there has been a fair exchange of considerations which removes this transaction from the ban of the First Amendment (4 N Y 2d, at p. 276).

This false assumption of the petitioners stems from their refusal to recognize that the difference between the cost of acquisition to the municipality and the price paid by the redeveloper at public auction does not represent a gift or subsidy to the redeveloper but is rather a measure of the cost of accomplishing the valid municipal purpose of clearing a slum area and providing for its redevelopment in a manner which will prevent recurrence of the blight. So the courts have held throughout the nation wherever this question has arisen. *State* v. *Land Clearance Commission*, 270 S. W. 2d 44, 53 (Sup. Ct. Mo., 1954); *Gremer* v. *Peoria Housing Authority*, 78 N. E. 2d 276, 284 (Sup. Ct., Ill., 1948); *People* v. *City of Chicago*, 111 N. E. 2d 626, 636 (Sup. Ct. Ill., 1953); *Foeller* v. *Housing Authority of Portland*, 256 P. 2d 752, 767 (Sup. Ct. Ore., 1953); *Velishka* v. *City of Nashua*, 106 A. 2d 571, 575, 576 (Sup. Ct. N. H., 1954); *Gohld Realty Co.* v. *City of Hartford*, 104 A. 2d 365, 370 (Sup. Ct. of Errors, Conn., 1954).

On the merits, therefore, there is no substantial basis for petitioners' reliance on the First Amendment. This Court's denial of certiorari in the *Harris* case and the ruling of the Court below sustaining the constitutionality of the City's acts—which petitioners do not challenge—require a like ruling with respect to the acts of the Federal Agency. As the Court below held, citing *Zorach* v. *Clauson*, 343 U. S. 306, 309 (1952), *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947), and *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), the First Amendment has equal impact upon the states and the Federal Government (Appendix "B", p. 32).

If anything, the City's acts were more extensive than those of the Government. The City promulgated the Lincoln Square project, established a collegiate re-use for a portion of the project site, accepted Fordham as the sponsor of the collegiate area and sold that area to Ford-

ham at public auction. The Federal Agency merely approved the project and agreed to reimburse the City for part of the cost of slum clearance. The First Amendment, made applicable to the states by the Fourteenth Amendment, forbids *all* governmental aid in the establishment of religion, whether by the Federal Government, the states, or political subdivisions of the states. The ban of the First Amendment is neither greater nor less on one governmental entity than on any other. If the City may lawfully spend public funds in consummation of the Lincoln Square project, as the Courts have held and petitioners no longer dispute, the expenditure of federal funds is equally lawful.

B. The Full Faith and Credit provision of the Constitution and statute (28 U. S. C., Sec. 1738) barred the petitioners from relitigating the issue of constitutionality of the Lincoln Square project in this action.

The complaint in the *64th St. Residences* action alleged that the Lincoln Square project violated the First Amendment and asked for a judgment declaring the project illegal and restraining the City of New York from expending its funds in connection with the project and from further processing the project plan with the Federal Agency (R. 20-22). In the *Gart* action the complaint alleged the same unconstitutionality (104a, 114a-116a) and asked for the same judgment of illegality, restraining the City from expending any of its funds or funds received from the Federal Agency and restraining the Federal Agency from expending any funds of the Government in carrying out the project (28a, 30a).

In the courts below the question as to whether the prior state court action was a real class action so as to be binding on the *Gart* plaintiffs was extensively briefed. The Court of Appeals, affirming the District Court, held the prior action to have been a real class action and the judgment therein binding on the present petitioners so as to bar them from relitigating the issue of constitutionality with the defendants who had been sued in the prior action

(Appendix "B", pp. 29-31). With this determination petitioners have no quarrel (Petition, pp. 2-3).

The Full Faith and Credit clause (Art. 4, Sec. 1) of the Constitution and the federal legislation pursuant thereto (28 U. S. C., Sec. 1738, 62 Stat. 947) require federal courts to give state court judgments the same force and effect as are given them by state courts. *Oklahoma Packing Co.* v. *Gas Co.*, 309 U. S. 4, 11 (1940). The judgment in the *64th St. Residences* action having established the constitutionality of the Lincoln Square project and the propriety of the expenditure of public funds by the City, the New York courts would not permit a relitigation of the same issue with respect to the expenditure of public funds by the Government in partially reimbursing the City: *Israel* v. *Wood Dolson Co.*, 1 N.Y 2d 116 (1956); *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14 (1937); *Cohen* v. *Dana*, 275 App. Div. 723 (2nd Dept., 1949), aff'd 300 N. Y. 608 (1949); *Eissing Chemical Co.* v. *People's Nat. Bank of Brooklyn*, 205 App. Div. 89 (2nd Dept., 1923), aff'd 237 N. Y. 532 (1923).

These cases were based upon the same principle of estoppel by judgment or *res judicata* pronounced by this Court in *United States* v. *California Bridge Co.*, 245 U. S. 337, 341 (1917).

The constitutional issue was the same in both actions and both complaints asked for a judgment restraining the expenditure of public funds—City funds in the state court action and City and Federal funds in this action. Moreover, the prior complaint sought to restrain the City from applying for federal moneys (R 21-22) and, as the Court below pointed out (Appendix "B" p. 32), the City's use of federal funds "was heavily stressed by the plaintiffs there [in the *64th St. Residences* case] in the petition for certiorari." (See Petition, *Harris* v. *City of New York*, *supra*, 357 U. S. 907, pp. 13-16, particularly p. 16, where it was said, "Directly affected is the Federal Government, which will be required to shoulder two-thirds of a direct subsidy of about 3½ million dollars to a religious institution.")

Therefore, both substantively and on the basis of the Full Faith and Credit clause of the Constitution, the first question presented by petitioners does not warrant consideration by this Court.

POINT II

Petitioners were not entitled to a hearing under any statutory or constitutional provision.

(a)

Paragraph 30 of the complaint alleges that the Federal Housing and Home Finance Agency violated the provisions of the Housing Act of 1949, as amended, and Section 4 of the Administrative Procedure Act of 1946 when it denied to the plaintiffs Schuckman Press, Inc. and Howdibon Garage Co., Inc. and others an opportunity to intervene and be heard with respect to the approval of the Lincoln Square Urban Renewal Project.

This contention misconceives the purpose and intent of Section 4 of the Administrative Procedure Act of 1946 (5 U. S. C. §1004). In *Bersoff* v. *Donaldson*, 174 F. 2d 494, 495 (U. S. C. A., Dist. of Col. Cir., 1949), the Court stated that Section 4 "confines the prescribed procedure to cases of adjudication '*required by statute* to be determined on the record after opportunity for agency hearing' " (emphasis in original). Where the statute does "not in terms require a hearing", it does not "come within the scope of the procedural provisions of the Administrative Procedure Act." See also, *Gardner* v. *United States*, 239 F. 2d 234 (5th Cir., 1956); *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (Dist. of Col. Cir., 1955), cert. den. 350 U. S. 884 (1955); and *Lesser* v. *Humphrey*, 89 F. Supp. 474 (U. S. D. C., M. D. Pa., 1950), where it was held that the Administrative Procedure Act is inapplicable

where the statute involved does not require an agency hearing even though one is had as a matter of grace.

Whether or not the petitioners were entitled to a hearing depends, therefore, upon the provisions of Title I of the Housing Act of 1949. That Title will be searched in vain for any provision requiring a public hearing by the agency before it may approve applications by local governing bodies for the grant of federal funds in aid of slum clearance. Indeed, where hearing is required it is clearly set forth. See, e. g., 42 U. S. C. §1455(d) which states that no land for any project to be assisted under this Title shall be acquired by the local public agency except after public hearing following notice of the date, time, place and purpose of such hearing.* The absence of provisions for hearings by the Federal Housing and Home Finance Agency, especially in view of the clear declaration of necessity for hearing by the local public agency, can only mean that it was the legislative intent not to require that the federal agency conduct hearings before granting its approval for such project.

(b)

Petitioners rely upon the decisions of this Court holding that a hearing is required even in the absence of a requirement in a statute where the adjudication involves life, liberty or property, *i.e.*, where such a hearing is required by the due process clause of the Fifth Amendment. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), and the other cases cited by petitioners (Brief, p. 13) and discussed by Judge CLARK in his opinion (Appendix "B", p. 36).

But petitioners have not been deprived of their property by any act of the Administrator. Their property has been taken by the City of New York in the now concededly

* Such hearings were in fact held. (Complaint, pars. 18, 20, pp. 18a-19a).

lawful exercise of its power of eminent domain. It is well settled that where private property is acquired for a public use, due process does not require a hearing on the necessity or expediency of the taking. It is only essential that the mode of determining the compensation to be paid is such as to afford the owners an opportunity to be heard. *Bragg* v. *Weaver*, 251 U. S. 57 (1919); *Sears* v. *City of Akron*, 246 U. S. 242, 251 (1918); *Georgia* v. *Chattanooga*, 264 U. S. 472, 483 (1924). The trial of the Lincoln Square condemnation proceeding is now in progress and it will not be disputed that petitioner Schuckman has already been paid the compensation fixed by the Court for its property.

POINT III

Petitioners have no standing to sue to prevent the disbursal of federal funds.

The only respondents against whom petitioners seek relief are the officials of the Federal Housing and Home Finance Agency (Petition, p. 3). The relief sought is an injunction restraining them from committing federal moneys in furtherance of the Lincoln Square Urban Renewal Project. However, since that project is concededly lawful it is well settled that such an action may not be maintained. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940); *City of Atlanta* v. *Ickes*, 308 U. S. 517 (1939); *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938); *Allied-City Wide, Inc.* v. *Cole*, 230 F. 2d 827 (D. C. Cir., 1956).

In the Court below petitioners acknowledged the validity of the principle stated in *Allied-City Wide* v. *Cole*, *supra*. Their answer to it was as follows (Appellant's Brief, p. 33):

> "Just as it is true that one who will be injured by another's lawful use of money has no standing to assert that a third person's action in providing that

money will be illegal', *Allied City-Wide Inc.* v. *Cole* (D. C. Cir.), 230 F. 2d 827, 828, it is equally true that one who will be injured by another's unlawful use of money has standing to enjoin a third person's illegal action providing it. See, *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 484-485; *Frost* v. *Corporation Commission*, 278 U. S. 515; cf. *Worthington* v. *Commodity Credit Corp.* (D.C. E.D. N.C.), 157 F. Supp. 497, 504-505. Therefore, in order to determine appellants' standing to challenge the constitutionality of the Federal Housing Administrator's action, this Court must first make an independent determination as to the validity of the City's action challenged as unconstitutional."

As has been noted, the determination by the Court of Appeals sustaining the constitutionality of the City's action in promulgating the Lincoln Square project and in condemning the project area is no longer challenged by petitioners. By their own reasoning, therefore, they have no standing to maintain this action.

Parker v. *Fleming*, 329 U. S. 531 (1947) is cited by petitioners (p. 15) as authority for their standing to sue the Federal Housing and Home Finance Agency. In that case, after the Price Administrator directed that an eviction certificate be issued to a landlord, the tenants filed a "protest" as permitted by the Emergency Price Control Act, §203(a), 56 Stat. 31, 50 U. S. C. App., §923(a). When their protest was denied, they sought judicial review of the denial in the Emergency Court of Appeals, pursuant to §204(a) of the Act, 56 Stat. 31, 50 U. S. C. App §924(a).

This Court held that the tenants were "subject to" a provision of a regulation or order of the Price Administrator and thus had standing to file the protest. It held further, that the tenants were persons "aggrieved" by the denial of their protest and could, therefore, seek review

of the order in the Emergency Court of Appeals (329 U. S., at pp. 533-534).

The distinction between *Parker* v. *Fleming* and the instant case is at once apparent. The National Housing Act of 1949, as amended, makes no provision for judicial review of the Administrator's action. The language of the Emergency Price Control Act, giving the tenants standing both to protest and to sue, has no counterpart in the National Housing Act. In the absence of such language, petitioners have no standing to sue. Cf. *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 135-139 (1947). They are precisely in the same position as the plaintiffs in the *Allied-City Wide* case *supra*, p. 19.

CONCLUSION

The petition for writ of certiorari should be denied.

April 9, 1959.

Respectfully submitted,

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APPENDIX

General Municipal Law, §72-k:

"§72-k. Acquisition of real property for clearance and rehabilitation; sale or lease of property for such purposes.

1. The governing board or other appropriate authority of a municipal corporation may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of any appropriate general, special, or local law applicable to the acquisition, of real property by such municipal corporation, real property or any interest therein necessary for or incidental to the clearance, replanning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas, together with adequate provision for recreational and other facilities appurtenant thereto.

2. In addition to employing any other lawful method of utilizing or disposing of any real property or any interest therein owned by a municipal corporation, or acquired by it pursuant to subdivision one of this section, such municipal corporation, acting through its board of estimate or other governing body, may sell, lease for a term not exceeding ninety-nine years, or otherwise dispose of any such real property to any person, firm or corporation at the highest marketable price or rental at public auction or by sealed bids pursuant to the provisions of any general, special or local law applicable to the sale or disposition of real property by such municipal corporation, for the purpose of clearance, replanning, reconstruction and neighborhood rehabilitation by the purchaser of such real property in substandard and insanitary areas, in such manner as may be prescribed by the board of estimate or other governing body. Any deed, lease or instrument by

which real property or any interest therein is conveyed or disposed of in, such manner shall contain provisions requiring the purchaser or grantee to clear, replan, reconstruct or rehabilitate such property in such manner as may be prescribed by the board of estimate or other governing body, and provisions insuring the use of such real property for purposes consistent with the clearance, replanning, reconstruction and neighborhood rehabilitation of substandard and insanitary areas. Such deed or instrument may contain such other provisions, conditions and restrictions, including specifications relating to clearance, replanning, reconstruction, and rehabilitation as may be prescribed by the board of estimate or other governing body. The prior consent of the city planning commission or other analogous body of such municipal corporation shall be required for the acquisition of property by such municipal corporation for the purposes of this subdivision, which prior consent shall be based upon a finding made by such city planning commission or other analogous body after a public hearing thereon, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area.

3. In proceeding under this section in addition to all other powers which it may exercise, a municipal corporation, acting through its board of estimate or other governing body, may: (1) cooperate with the federal government and apply for and accept financial assistance, loans and grants, as provided in title I of the housing act of nineteen hundred forty-nine and all federal laws amendatory and supplemental thereto; (2) provide local grants-in-aid in the form of municipal services and facilities as provided under such federal laws; (3) contract with the federal government as provided under such federal laws including agreements to comply with (a) provisions requiring

payment of not less than certain minimum salaries and wages to architects, engineers, technicians, laborers, mechanics and other personnel; (b) provisions prohibiting rebates and kick-backs; (c) provisions requiring contractors and subcontractors to furnish reports and other data to the secretary of labor; and (d) such other provisions, covenants and conditions as the federal agency may deem necessary or desirable for effectuating the federal purposes; (4) issue bonds or other obligations for the acquisition of the property in the same manner as for the acquisition of property for other public purposes. The period of probable usefulness of such purpose is hereby determined to be fifteen years; (5) provide, in the discretion of the board of estimate or other local governing body, for clearance of the property by the municipality or by the person, firm or corporation to whom such property is sold or leased. In the event that clearance is provided by the municipality, the cost of such clearance shall be financed in the same manner as acquisition costs."

BRIEF FOR THE RESPONDENTS ALBERT M. COLE AND WALTER S. FRIED IN OPPOSITION

FILED
APR 16 1959
JAMES R. BROWNING, Clerk

No. 771

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY, d/b/a Loric Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO., INC., SCHUCKMAN PRESS, INC., 145-147 W. 61st CORPORATION, individually and on behalf of all others similarly situated,
Petitioners

v.

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency; WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS ALBERT M. COLE AND WALTER S. FRIED IN OPPOSITION

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BRIEF FOR THE RESPONDENTS ALBERT M. COLE AND WALTER S. FRIED IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 156a-165a) is reported at 166 F. Supp. 129. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. B) is at 263 F. 2d 244.

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1959. The petition for a writ of

certiorari was filed on March 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Federal Government's financial participation in a local slum clearance program, pursuant to which Fordham University in accordance with its contractual obligations as a project sponsor purchased at public auction a portion of the project site for development for university purposes, constituted a violation of the First Amendment to the United States Constitution.

2. Whether the petitioners were denied a hearing to which they were entitled in circumstances where New York City officials held public hearings on a plan of redevelopment and where the Administrator of the Housing and Home Finance Agency received and considered the petitioners' protests regarding the feasibility of the plan for relocating families displaced from the project area but did not hold a formal hearing as a basis for his approval of the plan as meeting the requirements of the Act.

STATUTES INVOLVED

Title 1, Section 105(d), of the Housing Act of 1949, 63 Stat. 416, as amended, 42 U.S.C. 1455(d), provides:

> No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing.

Section 5 of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. 1004, provides:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *.

STATEMENT

This action was instituted by the petitioners, a group of tenants and owners of premises in the Lincoln Square area in New York City, to enjoin the Administrator of the Housing and Home Finance Agency ("HHFA") from continuing the Federal Government's financial participation in the Lincoln Square urban redevelopment project.

1. *The Housing Act of 1949.* In the interest of "the general welfare and security of the Nation and the health and living standards of its people * * *", Congress in 1949 enacted a program for "the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas * * *." 63 Stat. 413, 42 U.S.C. 1441. To achieve this objective, Congress authorized the Administrator of the HHFA to make grants and loans to local public agencies which submitted plans for slum clearance and urban redevelopment. 42 U.S.C. 1452, 1453. No loan or grant, though, may be made available unless the Administrator first determines that the proposed redevelopment program is "workable" (42 U.S.C. (Supp. V) 1451(c)), including a "feasible" method for temporarily relocating families who are to be displaced from the urban renewal area (42 U.S.C. (Supp. V) 1451(c), 1455(c)).

2. *The Lincoln Square Redevelopment Project.* In 1954, local officials in New York City declared the Lincoln Square area, on the west side of the Borough of Manhattan, to be "substandard and insanitary." *64th St. Residences* v. *City of New York*, 4 N.Y. 2d

268, 274. Thereafter, in accordance with Article XVIII of the New York State Constitution and Section 72k(3) of the New York General Municipal Law, the City authorities drew up a redevelopment plan covering a 13 block area. *Ibid.* The plan contemplated the division of the redevelopment area into major project sites for the purposes of housing, a collegiate center, and a performing arts center (R. 34a). Before submitting this plan to the HHFA to secure federal financial assistance, the City designated a sponsor for each of these sites: the respondents Webb & Knapp Lincoln Square Corporation, Fordham University, and Lincoln Center for the Performing Arts, Inc., respectively (R. 37a). Each of these sponsors agreed that, at a public auction of the project land, it would bid a minimum stipulated amount. In return, the City agreed to acquire the land for each site and to sell the land at public auction. The sponsors were not assured that they would be able to purchase the land for the minimum amount they had agreed to bid; on the contrary, the land was to be sold to the highest bidder at the auction, whether that bidder was a sponsor or another person or institution (R. 37a).

On November 12, 1956, various tenants and property owners in the project area, including several of the present petitioners, filed with the HHFA a petition, together with an extensive memorandum, seeking permission to intervene in the Administrator's consideration of the qualification for federal assistance of the City's proposed project (R. 63a-67a). In this petition and memorandum, they set forth in great detail their objections to the relocation procedures which had been adopted by the City. Receipt of their petition was

acknowledged by the agency (R. 68a). In addition, the agency advised the petitioner that "in making available Federal financial assistance for slum clearance and urban renewal projects, [the HHFA] is always seeking to assure itself as to the legality and eligibility of the Project. This information furnished by you will be considered with other documentation when the application for loan and grant is reviewed by our New York Regional Office." No formal intervention was granted and no further hearing was held by the Administrator (R. 68a).

On August 22, 1957, the Board of Estimate of the City of New York referred the final project plan to the New York City Planning Commission for approval (R. 18a). Public hearings were held on September 10, 1957, at which the charge was made that the sale of the property to Fordham University, at a price lower than that paid for it by the City of New York, would constitute a subsidy to a religious institution in violation of the Federal Constitution (R. 18a). On September 11, 1957, the City Planning Commission approved the project. On November 26, 1957, the Board of Estimate, after further hearings,[1] approved the plan, including the acquisition of the area by condemnation, the execution of a capital grant contract with the Housing and Home Finance Agency and the agreements with the various sponsors (R. 20a, 21a).

The City's plan was then submitted to the HHFA, which approved the project and agreed to pay two-thirds of the difference between what the City paid for the land and the amount it received at the auction

[1] At least four public hearings on the redevelopment plan were conducted by City officials before the Board of Estimate finally approved the proposed program (R. 36a).

(R. 35a, 156a). On February 28, 1958, the City took title to the project area by condemnation, and, by public auction, sold the various parcels to project redevelopers (R. 37a). Fordham University was the only bidder for the educational site and, consequently, it bought the land for the previously stipulated minimum price of seven dollars per square foot (R. 37a, 44a).[2] Fordham agreed, as a condition of the sale, to raze the buildings on the site, relocate the tenants and use the cleared land only for a university campus and buildings. (R. 105a).

3. *Prior Litigation.* In November, 1956, prior to the date that the Board of Estimate approved the project, a group of owners and tenants, including one of the petitioners in the present action, sued to enjoin the City from proceeding with the project. Counsel for the plaintiffs was the same attorney who represents the petitioners here. The New York Supreme Court in March, 1957, dismissed the complaint as premature. *Loebner* v. *City of New York*, 162 N.Y.S. 2d 233. A second action, brought seven months after *Loebner* had been dismissed, by a property owner represented by the same counsel, was dismissed on November 18, 1957 (R. 108a, 134a).

On December 2, 1957, a third action was instituted by a group of owners and tenants against the City of New York and a number of City officials (R. 109a,

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[2] Originally the minimum price for the educational site had been set at five dollars per square foot. However, this was raised to seven dollars after a special appraisal by HHFA appraisers, which was occasioned in part by the "nation-wide public concern that a religious institution might be publicly subsidized by the sale of land for its use at less than fair [market] value." (R. 49a).

134a). Again the plaintiffs were represented by the same counsel who represents the petitioners here. Three of the project sponsors, Fordham University, Lincoln Center for the Performing Arts, and Webb & Knapp Lincoln Square Corporation, all respondents in the present proceedings, intervened as defendants. The defendants' motions for summary judgment were granted by the Special Term of the Supreme Court and the Appellate Division of that court unanimously affirmed. *64th St. Residences* v. *City of New York*, 5 App. Div. 2d 824. On further appeal, the New York Court of Appeals unanimously affirmed the determination of the Appellate Division, 4 N.Y. 2d 268. In answer to the appellants' contention that Fordham University had received a government subsidy, the court stressed that every appraisal of the land, subject to the use restrictions imposed by the City, reported a figure lower than the minimum amount which Fordham had agreed to pay. *id.* at 276. In short, the court held that the guaranteed minimum price was a least equal to the market value of the property purchased. *Ibid.*

The appellants then petitioned this Court for a writ of certiorari on the ground that the City's sale of land to Fordham University constituted a violation of the First and Fourteenth Amendments to the United States Constitution. The petition was denied, *sub nom. Harris* v. *City of New York*, 357 U.S. 907.[3]

[3] While the *64th St. Residences* case was on appeal in the New York courts, a fourth action to enjoin the project was instituted in the United States District Court for the Southern District of New York by a group of tenants and owners, again represented by the same counsel (R. 110a). The District Court stayed the proceedings and eventually dismissed them at the same time that the complaint in the present action was dismissed (R. 110a, 170a).

4. *This Litigation.* Seven days after this Court denied the petition for a writ of certiorari in *64th St. Residences,* the present petitioners, represented by the same counsel who appeared in the first four unsuccessful attacks upon the project, instituted this action in the United States District Court for the Southern District of New York. Included among the defendants, for the first time, were respondents Cole, the Administrator of the Housing and Home Finance Agency, and Fried, the Regional Administrator. The complaint advanced the same constitutional objections which had been rejected by the New York State courts in *64th St. Residences.* In addition, petitioners contended that they had been unlawfully deprived by the HHFA of an opportunity to "intervene and be heard" on the workability of the project plan. Accordingly, they prayed for an injunction to prevent the respondent HHFA officials, and each of the other named respondents, from continuing their participation in the project (R. 8a-31a).

Each of the respondents moved for summary judgment and for dismissal of the complaint for failure to state a claim (R. 96a-137a). The motion on behalf of the HHFA respondents was grounded also on improper venue and the failure to obtain jurisdiction over an indispensable party, Administrator Cole (R. 96a-100a). The District Court awarded summary judgment and dismissed the complaint (R. 156a-165a).

The Court of Appeals unanimously affirmed (R. 168a-178a). It held that the petitioners were barred by the judgment in *64th St. Residences* from relitigating the constitutional issues there decided against them (R. 171a-173a). It determined that this bar extended also to the petitioners' asserted constitutional

objections to the Federal Government's participation in the project since, under New York law, the *64th St. Residences* judgment barred relitigation of those contentions against strangers to the earlier action (R. 173a-174a). As to the respondent HHFA officials, the court, rejecting the Government's argument to the contrary, held that venue was properly laid in the Southern District of New York and that the court had jurisdiction over all indispensible parties (R. 174a-176a). But with respect to the petitioners' contention that they were unlawfully denied an oral hearing in which to challenge the feasibility of the City's relocation plan, the court held that Section 5 of the Administrative Procedure Act, which requires a hearing in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing", was inapplicable to the Administrator's consideration of the relocation program (R. 177a-178a). This is so, it reasoned, because the Administrator's consideration is not an "adjudication" of individual rights and also because there was no requirement in the Housing Act for a hearing.[4]

ARGUMENT

The present litigation is the fifth attempt by Lincoln Square area property owners and tenants to block the progress and completion of the Lincoln Square rede-

[4] With respect to petitioners' additional contention that the sale at public auction of project land to sponsors at negotiated minimum bids was not permitted by the Housing Act, the court held that they lacked standing to assert it (citing *Massachusetts* v. *Mellon*, 262 U.S. 447; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931-932 (C.A. D.C.), certiorari denied, 350 U.S. 884; *Allied-City Wide* v. *Cole*, 230 F. 2d 827 (C.A. D.C.), (R. 176a). This contention has not been renewed in this Court.

velopment project. Furthermore, this petition constitutes the second endeavor by the petitioners, or members of the class they represent, to obtain review by this Court of decisions sustaining the validity of the project. Just as this Court declined to review the decision in *64th St. Residences,* so, too, the present petition for certiorari (which raises, in part, the same contentions involved in that case) should be denied. There is no substantial question involved nor any conflict between the decision of the court below and prior decisions of this Court or of other courts of appeals.

1. In substance, petitioners suggest that the sale of project land to Fordham violated the First Amendment because Fordham paid less to New York City than the City originally paid in acquiring the property (Pet. 9-11). This argument, which glosses over the fact that the land was bought at public auction and subject to reuse restrictions imposed by the City, is, for all intents and purposes, precisely the contention made by the petitioners and rejected by the Court of Appeals in the earlier *64th St. Residences* case. 4 N.Y. 2d 268, 269.

Moreover, petitioners' assertion is without merit. In *Berman* v. *Parker*, 348 U.S. 26, 34-35, this Court observed that it is "within congressional power" to permit federal funds to be employed in connection with an urban redevelopment plan which makes provision for schools and churches as well as for houses, parks and shopping centers. Accordingly, it is beyond question that the participation by Fordham University in the Lincoln Square project was not *per se* violative of the

First Amendment. Petitioners seemingly suggest, however, that the *Berman* decision does not mean that a religious institution may "participate as urban redevelopers, and pay less than market value, or even nothing, for the land which [it] redevelop[s]." (Pet. 11.) Whether petitioners are right in this belief is of no moment here. This is because the facts of their hypothetical case clearly do not describe the present case.

a. The petitioners' major error is their implicit assumption that the market value of the land purchased by Fordham is reflected by the price paid by the City in buying up the slum property. As the New York Court of Appeals in *64th St. Residences* properly stressed, the use-restricted property purchased by Fordham was not the same as the unrestricted property purchased by the City. On the contrary, "The city [bought] land and buildings. Fordham [bought] the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only." 4 N.Y. 2d 268, 275, 276. In light of these conditions and restrictions, it could have come as no surprise that the purchase price paid by Fordham was well below the cost to the City. And, since Fordham was not outbid at the public auction of the use-restricted land, the price which it paid may fairly be said to represent at least market value.

b. Moreover, since the New York courts, in *64th St. Residences*, held that Fordham received no subsidy or

gift, that issue is no longer open to litigation. While it is true that the respondents Cole and Fried were not parties to the *64th St. Residences* litigation, the present petitioners were members of the class whose representatives there argued unsuccessfully that Fordham was receiving a subsidy. Having once litigated that issue and lost, members of the complaining class would not be able to raise it again in New York State courts against the same or different defendants. *Israel* v. *Wood Dolson Co.*, 1 N.Y. 2d 116, 134 N.E. 2d 97; *Good Health Dairy Products Corp. of Rochester, N.Y.* v. *Emery*, 275 N.Y. 14, 9 N.E. 2d 758. The federal courts must test the effect of the state court judgment by the rules the state court itself would apply. *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 309 U.S. 4; *Wright* v. *Georgia R.R. & Banking Co.*, 216 U.S. 420; *Covington* v. *First Nat. Bank*, 198 U.S. 100; *Union & Planters' Bank* v. *Memphis*, 189 U.S. 71; cf. *Angel* v. *Bullington*, 330 U.S. 183. Therefore, the court below was clearly correct in holding that it has been finally determined that Fordham University was not subsidized with government funds.

2. Section 105(d) of the Housing Act of 1949, 42 U.S.C. 1455(d), requires the local public agency to conduct public hearings concerning the proposed redevelopment plan. Accordingly, the respondent Board of Estimate of the City of New York held extensive public hearings prior to the submission of the plan to the HHFA. Consequently, it is clear that the hearing requirement of Section 105(d) was satisfied and the petitioners do not contend otherwise. Rather, they argue that they did not receive an adequate hearing by the Administrator on the feasibility of the method for

relocating the families displaced from the Lincoln Square area (Pet. 11-16).[5]

a. While we believe the only hearing to which the petitioners were entitled was before the local agency (see *infra*, p. 14), it is important to note, first of all, that the Administrator accepted their extensive petition and memorandum, and assured petitioners' counsel that the information furnished would "be considered with other documentation when the application for loan and grant is reviewed by our New York Regional Office." (See *supra*, p. 5.) Therefore, in asserting that they were denied "an opportunity to intervene and be heard" (Pet. 5), petitioners are complaining simply that they were not afforded an *oral* hearing.

b. The petitioners' claim that they were not afforded their full administrative rights is grounded on the requirement in Section 5 of the Administrative Procedure Act respecting notice and hearing "[i]n every case [where] adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing * * *." 5 U.S.C. 1004. The petitioners, though, are unable to point to any provision in the Housing Act requiring an agency hearing prior to the approval of a redevelopment plan; on the contrary, they concede that the Act "specifies only a hearing before a local

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[5] While it is not necessary to detail the point here, it is clear that the petitioners' contention that they were not afforded an adequate hearing is barred by laches. The agency letters which the petitioners contend constituted a denial of their administrative petition were received a year and a half before the institution of the present action (R. 1a, 17a, 68a, 70a). During the interim, the HHFA approved the City's plan and advanced federal funds, and the property in the project area was condemned and sold to redevelopers (see *supra*, pp. 4-6).

public agency * * *." (Pet. 12.) The requirement for that hearing was fully satisfied. (See *supra*, p. 5.)

The petitioners infer, however, a statutory hearing requirement from Section 101(c) of the Housing Act, 42 U.S.C. (Supp. V) 1451(c), which directs the Administrator to review locally-submitted redevelopment proposals to determine whether they conform to the standards prescribed by Congress. The answer to petitioners' argument is that the Administrator's review of the "workability" of the City's redevelopment plan was not "adjudication." "Its primary concern [was not] with individual rights, liabilities for past conduct, or present status under existing law * * *." *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 693 (C.A. 9), certiorari denied, 338 U.S. 860; cf. *Philadelphia Co.* v. *Securities and Exchange Com'n*, 175 F. 2d 808, 816 (C.A. D.C.), vacated as moot, 337 U.S. 901. Rather than being directed at individual persons, the Administrator reviewed a "situation" where "[i]ndividual protestations of injury are normally and necessarily lost in the quantum of the greater good." *Willapoint Oysters* v. *Ewing*, *supra*, at 693. For this reason the cases relied upon by petitioners, *i.e.*, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, *Riss & Co.* v. *United States*, 341 U.S. 907, and *Cates* v. *Haderlein*, 342 U.S. 804, are inapposite. In each of them, unlike this case, the administrative action was unmistakably adjudication of an individual's rights or status; in each, the critical issue was whether the adjudication was "required by statute to be determined on the record after opportunity for an agency hearing".

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[6]

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[6] In their disposition of the case the courts below erred, we believe, in concluding that the trial court had jurisdiction over the indispensible parties. Consequently, if the petition is granted, we may again urge that the district court should have dismissed the action without reference to the merits of the claims.

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